90-744

No. _____

In The

Supreme Court of the United States

October Term, 1990

OMAR I. GONZALES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER INDIVIDUAL OR PERSONAL OPINIONS OF TRIAL COURTS MAY BE UTILIZED TO PROHIBIT OR DENY CONSIDERATION OF ISSUES WHICH ARE EMBODIED WITHIN AND AUTHORIZED BY THE FEDERAL SENTENCING GUIDELINES.

II. WHETHER A TRIAL COURT MAY PRECLUDE CONSIDERATION OF A MINOR ROLE UNDER THE FEDERAL SENTENCING GUIDELINES BASED UPON HIS PERSONAL JUDGEMENT THAT THE PRESENCE OF THREE HUNDRED (300) KILOGRAMS OF MARIJUANA PRECLUDES A MINOR ROLE.

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PETITION FOR WRIT OF CERTIORARI

OMAR I. GONZALES, Petitioner herein, by and through his appellate attorney of record, CHARLES LOUIS ROBERTS, hereby petitions this Court to grant a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Tenth Circuit in *United States v. Omar*

Gonzales, No. 89-2111 was entered on September 6, 1990; and this Order is reproduced herein as Appendix B p. App. 10. The Opinion of the panel of the United States Court of Appeals for the Tenth Circuit in *United States v. Omar Gonzales*, No. 89-2111 was entered as an unpublished Slip Opinion on June 21, 1990, and is reproduced herein as Appendix A, pp. App. 1-9.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Tenth Circuit was entered on September 6, 1990. This Petition is timely filed within sixty (60) days of September 6, 1990, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL SENTENCING GUIDELINES INVOLVED

The *Federal Sentencing Guidelines* read in pertinent part:

§ 3B1.2. Mitigating Role

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

Guidelines, § 3B1.2

The "Commentary" to the *Guidelines* provides as follows in regard to a mitigating role in the offense:

Application Notes:

1. Subsection (a) applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant.

2. It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier of a single smuggling transaction involving a small amount of drugs.

3. For purposes of § 3B1.2(b), a minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal.

. . . The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case.

***Guidelines*, "Commentary",**
to 3B1.2

STATEMENT OF THE CASE

On December 16, 1988, OMAR IVAN GONZALES, Petitioner herein, was indicted in the United States District Court, District of New Mexico for possession with

intent to distribute marijuana in violation of 21 U.S.C. 841(a)(1), 21 U.S.C. 841(b)(1)(C). The Petitioner was sentenced to eighty-seven (87) months with four (4) years supervised release. Petitioner filed a timely Notice of Appeal. The Tenth Circuit Court of Appeals affirmed this Petitioner's conviction on June 21, 1989, *United States v. Gonzales*, No. 89-2111, Slip Opinion.

The Tenth Circuit Court of Appeals' Opinion found the following:

> On Appeal Gonzales set forth three issues: (1) whether the trial court erred in making an explicit holding that the appellant was not even entitled to consideration as a minor participant based solely on the amount of marijuana; (2) whether the trial court erred in failing to make an explicit holding together with reasons supporting such holding regarding the disputed issue of the appellant's role in the offense; and (3) whether the trial court erred in refusing to consider the role of the appellant while also refusing to hold an evidentiary hearing on this issue. In essence, Gonzales contends that the district court erred in finding that he was not a minor participant and in not affording him an adequate evidentiary hearing.
>
> The Sentencing guidelines provide adjustments for the offense level based on the role the defendant played in committing the offense. U.S.S.G. Ch. 3, Pt.B. intro, comment. When an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply. Id. Under § 3B1.1 (Aggravating Role), the sentence may increase the offense level if the defendant was the organizer, leader, manager or supervisor of the criminal activity. Under § 3B1.2(b) (Mitigating Role), the sentence may decrease the offense level by two levels if the

defendant "was a minor participant." A minor participant "means any participant who is less culpable than most other participants, but whose role could not be considered as minimal." U.S.S.G. § 3B1.2, comment. (n.3). Under § 3B1.2, an adjustment "involves a determination that is heavily dependent upon the facts of the particular case." U.S.G. § 3B1.2, comment. (backg'd.).

"We recently decided that the quantum of proof required for factual determinations under the Sentencing Guidelines is a preponderance of the evidence and the burden of proof generally is allocated to the government for sentence increases and to the defendant for sentence decreases." *United States v. Rutter*, 897 F.2d 1558, 1560 (10th Cir. 1990), citing *United States v. Kirk*, 894 F.2d 1162, 1164 (10th Cir. 1990). We review the district court's determinations relative to the defendant's role in a criminal activity under the clearly erroneous standard. *United States v. Mays*, No. 89-6123, slip op. at 4 (10th Cir. 1990), May 7, 1990). Thus, we will not reverse the district court's findings unless they are without factual support in the record, or if, after reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been made. *United States v. Beaulieu*, 893 F.2d 1177, 1182 (10th Cir. 1990).

As set forth, *supra*, the district court specifically found that Gonzales, as the driver of a truck bringing in 300 kilos of marijuana, was not a minor participant. The Presentence Report set forth in detail the relevant, uncontested facts surrounding Gonzales' arrest, including but not limited to: Gonzales' driving a pickup truck from Mexico into the United States with 662 pounds of marijuana; Gonzales' attempt to flee from the Border Patrol; Gonzales' abandonment of the pickup, and his subsequent capture and arrest. Gonzales did not object to or contradict

any of the facts set forth in the Presentence Report. Nor did Gonzales establish via credible evidence why he should be considered a minor participant, i.e., "a participant who is less culpable than most other participants". U.S.S.G. § 3B1.2. Rather, Gonzales has simply objected to the the [sic] district court's interpretation of the relevant, uncontested facts. (*See United States v. Davis*, No. 89-1086, slip op. at 12 (10th Cir. 1990)).

Under these circumstances, we hold that Gonzales has failed to establish by a preponderance of the evidence that he was a minor participant. See: *United States v. Gordon*, 895 F.2d 932, 935 (4th Cir. 1990) (drug courier not automatically entitled to a reduction under U.S.S.G. § 3B1.2); *United States v. Williams*, 890 F.2d 102, 104 (8th Cir. 1989) (defendant's status as a courier does not necessarily mean he is less culpable than other participants in a drug operation and entitled to a reduction under U.S.S.G. § 3B1.2); *United States v. Velazquez*, 890 F.2d 717, 720 (5th Cir. 1989) (defendant merely acting as a driver waiting on international border to receive thirty pounds of marijuana not entitled to downward adjustment as a minimal/minor participant); *United States v. Buenrostro*, 868 F.2d 135, 137-18 (5th Cir. 1989) (alleged one-time drug courier not a minimal participant" under U.S.S.G. § 3B1.2).

Nor do we perceive any merit in Gonzales' contention that the district court did not provide him with an adequate hearing. During the sentencing hearing both Gonzales and his counsel were afforded the opportunity to speak in detail relative to his participation in the criminal activity. Thereafter, and prior to sentencing the district court specifically inquired if there was "[a]nything further before I impose sentence" to which counsel for Gonzales responded, "no." The district court's finding that Gonzales was

not a minor participant in the charged crime was not clearly erroneous.

United States v. Gonzales,
Slip Opinion (June 21, 1990)
at pp. 4-8

The Petitioner's Rehearing was denied on September 6, 1990.

The Presentence Report (P.S.I.) reads in pertinent part as follows:

> 5. The lead vehicle was a pickup with no license plates. When the Border Patrol unit turned on his lights, the lead vehicle came to an abrupt stop, forcing the second vehicle, a pickup with Texas license plates and camper shell, to come to an abrupt stop. The second vehicle then pulled around the first vehicle and proceeded down the highway. The deputy stayed with the first vehicle while the Border Patrol agent pursued the second vehicle. The agent pursued the pickup for approximately four miles before the pickup decelerated and swerved off the highway. The truck accelerated across country for about another mile before coming to a stop.
>
> Because of rough terrain and dust raise by the first pickup, the agent had to slow down and upon reaching the pickup discovered that the driver had abandoned the vehicle. The agent immediately began to circle the vehicle in an attempt to located the driver. A male subject jumped up from behind some brush and began running away from the agent's vehicle. The agent pursued the subject for a short distance until the subject came to a stop and was apprehended. The agent asked the subject why he had run from him. The subject replied that he had stolen the pickup from El Paso, Texas. The

driver was identified as the defendant, Omar Gonzales.

6. The agent opened the back of the camper shell and observed packages of marijuana. The agent locked the camper shell and drove back to the first vehicle, with the defendant in custody. The officer at the scene of the first vehicle advised that the truck driver had abandoned the vehicle and was not apprehended. The agents returned to the pickup driven by the defendant and conducted a field test, which test positive for marijuana. The total weight of the 31 packages of marijuana was approximately 715 pounds, gross weight. Further investigation into the theft of the pickup truck which the defendant was driving proved negative. Net weight was determined to be 662 pounds, or approximately 301 kilograms.

7. The defendant, through his attorney, admits his involvement in the instant offense. The defendant advises that he was hired to drive a truck carrying marijuana across the United States/Mexico boundary to an unknown designation in the United States. The defendant states that he was not in charge of the smuggling operation and was under the supervision of other coconspirators at the scene. The subject states that he was to receive about $5,000. He indicates that his reason for becoming involved in the offense was for financial gain. Counsel for the defendant believes that because of the defendant's involvement he should be treated as a minor participant and entitled to a reduction in the total offense level.

Presentence Report,
at pp. 2-3

Neither the government nor the probation office nor the court contradicted or disputed the facts asserted in Paragraph No. 7, *supra*.

In addition, at the sentencing hearing the trial counsel for Petitioner again asserted the facts that Petitioner was the mere driver of the load vehicle following a lead vehicle which was driven by a more culpable individual who was supervising Petitioner and who, unlike Petitioner, knew the route and destination of the marijuana. This fact was undisputed by the P.S.I., the government, and the Court. Also, trial defense counsel proffered the fact that another individual was involved as the organizer of the venture in an even more culpable role. This fact was also undisputed by the P.S.I., the government or the court.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. **WHETHER INDIVIDUAL OR PERSONAL OPINIONS OF TRIAL COURTS MAY BE UTILIZED TO PROHIBIT OR DENY CONSIDERATION OF ISSUES WHICH ARE EMBODIED WITHIN AND AUTHORIZED BY THE FEDERAL SENTENCING GUIDELINES.**

II. **WHETHER A TRIAL COURT MAY PRECLUDE CONSIDERATION OF A MINOR ROLE UNDER THE FEDERAL SENTENCING GUIDELINES BASED UPON HIS PERSONAL JUDGMENT THAT THE PRESENCE OF THREE HUNDRED (300) KILOGRAMS OF MARIJUANA PRECLUDES A MINOR ROLE.**

1. Reasons Why The Writ Should Be Granted:

This case revolves around the central question of whether a trial judge may preclude consideration of a minor role solely because of the amount of controlled

substance involved in the case which in this case was some three hundred (300) kilos of marijuana. Counsel asserts that the above question is not only important, but worthy of certiorari consideration because it goes to the very heart of one of the central purposes of the *Federal Sentencing Guidelines*, (West 1990), which is uniformity:

> Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.
>
> Honesty is easy to achieve: The abolition of parole makes the sentence imposed by the court the sentence the offender will serve. There is a tension, however, between the mandate of uniformity (treat similar cases alike) and the mandate of proportionality (treat different cases differently) which, like the historical tension between law and equity, makes it difficult to achieve both goals simultaneously. Perfect uniformity – sentencing every offender to five years – destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that lumps together armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, is far too broad.
>
> * * *
>
> The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combination: means that the

> list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected (and therefore may already be counted, to a different degree, in the punishment for the underlying offense); and also because, in part, the relationship between punishment and multiple harms is not simple additive. The relation varies, depending on how much other harm has occurred. (Thus, one cannot easily assign points of reach kind of harm and simply add them up, irrespective of context and total amounts.)
>
> ***Federal Sentencing Guidelines,***
> **at pp. 2, 3**

This clearly expressed intent to foster uniformity simply precludes a United States District Judge from taking a personal position that there can be no minor role in consideration of say a three hundred (300) kilogram case. Such automatic personal preclusions are the exact opposite of automatic personal opinions and are prohibited by the same principles, see *United States v. Gordon*, 895 F.2d 932, 935 (4th Cir. 1990); *United States v. Williams*, 890 F.2d 102, 104 (8th Cir. 1989); *United States v. Velazquez*, 890 F.2d 717, 720 (5th Cir. 1989) and *United States v. Buenrostro*, 868 F.2d 135, 137-38 (5th Cir. 1989). Thus, this case presents an ultimate issue of whether individual or personal opinions of trial courts may be utilized to prohibit or deny

considerations of issues which are embodied within and authorized by the Federal Sentencing guidelines; and, specifically, whether a trial court may preclude consideration of a minor role under the federal sentencing guidelines based upon this personal judgment that the presence of three hundred (300) kilos of marijuana precludes a minor role.

2. Arguments On The Merits:

In this case, the trial court precluded consideration of a mitigating role which is required to be considered under the Federal Sentencing Guidelines. He did so on the basis of the amount along which was some 300 kilograms of marijuana. The only proper reading of the Federal Sentencing Guidelines is that the mitigating adjustment is available to all levels of offenses and the federal guidelines say exactly that. Had Congress intended to allow for no mitigating role say above Level 26, Congress could have done so by stating so. Congress clearly intended a universal application.

In *United States v. Liparota*, 471 U.S. 419 (1985), the United States Supreme Court recently declared that it is still holding steadfast . . .

> . . . with our longstanding recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). See also *United States v. United States Gypsum Co., supra*, 438 U.S. at 437, 98 S.Ct., at 3872; *United States v. Bass*, 404 U.S. 336, 347-348, 92 S.Ct. 515, 522-523, 30 L.Ed.2d 488 (1971); *Bell*

> *v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905 (1955); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229-230, 97 L.Ed. 260 (1952). Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. *See United States v. Bass, supra*, 404 U.S., at 348, 92 S.Ct. at 523 "[B]ecause of the seriousness of criminal penalties, and because, criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity").
>
> ***Liparota,***
> **471 U.S. at 425-426**

In applying this rule of levity, the United States Supreme Court has also declared that the "plain words" of the statute always control and always should control:

> Congress has spoken in the plainest words, [and made] it abundantly clear . . . Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review. . . .
>
> ***T.V.A. v. Hill,***
> **437 U.S. 153, 194-1195 (1978)**

And this principle has been reaffirmed even in situations where the Courts have been convinced of the possibility that Congress may have meant to do more or go farther than the language of the statute that Congress actually passed:

> . . . that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. "There is a basic difference between filing a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. *Mobil Oil Corp v. Higginbotham*, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978). * * * On the contrary, deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that "the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United Stated*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962).
>
> ***United States v. Locke,***
> **471 U.S. 84, 95-96 (1985)**

Applying these general rules, the United States Supreme Court reversed a conviction under 18 U.S.C. 924(c) in *Busic v. United States*, 446 U.S. 398 (1980). The Supreme Court in that case noted and followed:

> The oft-cited rule that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971), quoting *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971).
>
> ***Busic,***
> **446 U.S. at 407**

In conclusion, the base offense level adequately takes into account the amount of drugs and becomes the starting point for the trial Court's determinations; thus it is only fair and logical that an adjustment can be made for

any level of offense because this two (2) point adjustment starts with the appropriate level and only goes two (2) points down, etc.

3. Reasons Why The Decisions Of The Court Of Appeals Is Erroneous

The cases cited by the United States Court of Appeals for the Tenth Circuit in affirming the Petitioner's sentence do not reach the Petitioner's contention that the trial court categorically removed him from consideration for minor participation solely because he was driver of a three (300) hundred pound load and irregardless of the undisputed facts that he at least qualified for consideration of a reduction under § 3B1.2(b). These cases merely state that there is no automatic right to the reduction in driver/courier cases, see *United States v. Gordon*, 895 F.2d 932, 935 (4th Cir. 1990); *United States v. Williams*, 890 F.2d 102, 104 (8th Cir. 1989); *United States v. Velazquez*, 890 F.2d 717, 720 (5th Cir. 1989); *United States v. Buenrostro*, 868 F.2d 135, 137-18 (5th Cir. 1989). Such cases do not stand for the opposite conclusion that certain amounts of contraband (300 kilos of marijuana) can automatically preclude consideration of a § 3B1.2(b) reduction for a person acting as a driver/courier. Indeed, Counsel would argue that the arguments against automatic inclusion found in the cases cited above would be equal to the situation of automatic preclusion as in our case. Also, given the fact that the statement that more culpable individuals existed appeared in the P.S.I., it was incumbent upon the government, the probation officer, or the court to dispute such facts.

Generally, when facts such as those set forth in a presentence report are not objected to by the government, they are assumed to be correct even when the government bears the burden, *United States v. Eberowski,* No. 89-1642 (5th Cir. Mar. 7, 1990); *United States v. Johnson,* 89-5609 (6th Cir. Mar. 5, 1990); *United States v. Smith,* No. 89-2126 (7th Cir. Mar. 21, 1990) and *United States v. Amerson-Bay,* No. 89-1940 (8th Cir. Mar. 22, 1990).

It would seem that essential fairness requires that the same rule which is so often used against the defendant should be available in the reverse situation when the government fails to object. In this case, given the lack of objection, contradiction, or even dispute, as to the existence of more culpable perpetrations the Petitioner would assert that the trial court should not have automatically precluded consideration, held a hearing, and made findings.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioners pray that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter reverse the judgment and sentence entered below, and to remand this cause for resentencing.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 89-2111
v.	)	(D.C. No. CR-88-513JC)
OMAR I. GONZALES, Defendant-Appellant.	)	(Dist. of N.M.)

ORDER AND JUDGMENT*
(Filed June 21, 1990)

Before SEYMOUR, BARRETT and BRORBY, Circuit Judges.

Omar I. Gonzales (Gonzales) appeals from a sentence imposed following his plea of guilty to possession with the intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

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* This Order and Judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Gonzales was charged in a two count indictment with possession with intent to distribute more than 100 kilograms of marijuana (Count I) and unlawfully importing more than 100 kilograms of marijuana into the United States (Count II). Gonzales plead guilty to Count I and Count II was dismissed.

The Presentence Report submitted to the court in Gonzales' case set forth the following relevant, uncontested facts:

> On November 11, 1988, a U.S. Border Patrol agent and a Hildago County Deputy Sheriff were notified of a sensor alert along the United States/Mexico Border, approximately 20 miles south of Hachita, New Mexico, Backup sensors were also activated which indicated the direction of travel of the vehicle. The agents arrived in an area along highway 81 and were able to observe two vehicles traveling from the area of the sensor alert.
>
> The lead vehicle was a pickup with no license plates. When the Border Patrol unit turned on his lights, the lead vehicle came to an abrupt stop, forcing the second vehicle, a pickup with Texas license plates and camper shell, to come to an abrupt stop. The second vehicle [driven by Gonzales] then pulled around the first vehicle and proceeded down the highway. The deputy stayed with the first vehicle while the Border Patrol agent pursued the second vehicle. The agent pursued the pickup for approximately four miles before the pickup decelerated and swerved off the highway. The truck accelerated across country for about another mile before coming to a stop. Because of rough terrain and dust raised by the first pickup, the agent had to

> slow down and upon reaching the pickup discovered that the driver had abandoned the vehicle. The agent immediately began to circle the vehicle in an attempt to locate the driver. A male subject jumped up from behind some brush and began running away. . . . The agent pursued the subject for a short distance until the subject came to a stop and was apprehended. . . . The driver was identified as Omar Gonzales.
>
> The agent opened the back of the camper shell and observed packages of marijuana. The agent locked the camper shell and drove back to the first vehicle, with the defendant in custody. The officer at the scene of the first vehicle advised that the truck driver had abandoned the vehicle and was not apprehended. . . . The agents returned to the pickup driven by the defendant and conducted a field test, which tested positive for marijuana. The total weight of the 31 packages of marijuana was approximately 715 pounds, gross weight. . . . Net weight was determined to be 662 pounds, or approximately 301 kilograms.
>
> The defendant, through his attorney, admits his involvement in the instant offense. The defendant advises that he was hired to drive a truck carrying marijuana across the United States/ Mexico boundary to an unknown destination in the United States. The defendant states that he was not in charge of the smuggling operation and was under the supervision of other coconspirators at the scene. The subject states that he was to receive about $5,000.

(R., Vol. II, Presentence Report, pp. 2-3; Paragraphs 4, 5, and 6)

Paragraph 9 of the Presentence Report stated that Gonzales had accepted personal responsibility for his criminal conduct. Paragraph 12 stated:

> Section 3B1.2(b) of the guidelines [United States Sentencing Commission Guidelines] addresses the issue of minor participant. The commentary for that section defines minor participant as a participant who is substantially less culpable than most other participants. The offense conduct in the instant case provides no indication that the defendant meets the criteria for the two level reduction.

The Presentence Report set forth Gonzales' total offense level as 24 and a criminal history category of IV which, when combined, established a guideline imprisonment range of 77 to 96 months.

Gonzales subsequently objected to the Presentence Report on the basis that:

> The defendant feels that he should be regarded as a minor participant because: (a) he was a mere driver; (b) he was being directed by another man riding in a lead vehicle which had the necessary professional expertise to allow him to escape; (c) the supervisor of the entire operation was yet another person.
>
> The defendant feels that the majority of the points added to the criminal history evaluation are repetative [sic] of one another since they involve conviction of arson, being on parole for the same conviction and committing an offense within the same period of time after a conviction. The defendant argues that such multiplication of points based on the same offense violates due process and the constitutional guarantee against double jeopardy.

(R., Vol. III, Addendum to the Presentence Report, p. 1).

During the sentencing hearing, counsel for Gonzales argued that "the facts of this case would justify finding that he [Gonzales] was a minor participant, in the sense that he was not the person who organized the entire foray, nor was he even the person at the scene that was in charge, but a mere driver of the truck." (R., Vol. V at p. 5). The court responded: "Mere driver of a truck bringing in 300 kilos? . . . To me, that's not a minor participant." *Id.* Counsel for Gonzales further argued "[s]omeone else was much more aware of what was going to happen or could get away. And I'd say that of the three people involved – the organizer, this other person, and him – he [Gonzales] was the one with the least culpability." *Id.*

After Gonzales' counsel had concluded his remarks, the court inquired if Gonzales had anything to say. Gonzales responded: "I would just like the court to be as lenient as possible in the sentence for me, and I'm sorry for what I did. Thank you." (R., Vol. V at p. 7.) The court then inquired if there was "[a]nything further before I impose sentence?" to which Gonzales' counsel answered, "no". *Id.* Thereafter, the court sentenced Gonzales to a term of 87 months imprisonment with a four-year period of supervised probation.

On appeal Gonzales sets forth three[1] issues: (1) whether the trial court erred in making an explicit

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[1] Although Gonzales originally set forth a fourth issue, "whether the trial court erred in failing to take into account the appellant's voluntary and successful submission to treatment for alcoholism, a circumstance not adequately covered by the sentencing guidelines," he did not develop this issue in his appellate brief.

holding that the appellant was not even entitled to consideration as a minor participant based solely on the amount of marijuana; (2) whether the trial court erred in failing to make an explicit holding together with reasons supporting such holding regarding the disputed issue of the appellant's role in the offense; and (3) whether the trial court erred in refusing to consider the role of the appellant while also refusing to hold an evidentiary hearing on this issue. In essence, Gonzales contends that the district court erred in finding that he was not a minor participant and in not affording him an adequate evidentiary hearing.

The Sentencing Guidelines provide adjustments for the offense level based on the role the defendant played in committing the offense. U.S.S.G. Ch.3, Pt.B, intro. comment. When an offense is committed by more than one participant, § 3B1.1 or § 3B1.2 (or neither) may apply. *Id.* Under § 3B1.1 (Aggravating Role), the sentencer may increase the offense level if the defendant was the organizer, leader, manager or supervisor of the criminal activity. Under § 3B1.2(b) (Mitigating Role), the sentencer may decrease the offense level by two levels if the defendant "was a minor participant." A minor participant "means any participant who is less culpable than most other participants, but whose role could not be considered as minimal." U.S.S.G. § 3B1.2, comment. (n.3). Under § 3B1.2, an adjustment "involves a determination that is heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2, comment. (backg'd.).

"We recently decided that the quantum of proof required for factual determinations under the Sentencing Guidelines is a preponderance of the evidence and the

burden of proof generally is allocated to the government for sentence increases and to the defendant for sentence decreases." *United States v. Rutter*, 897 F.2d 1558, 1560 (10th Cir. 1990), *citing United States v. Kirk*, 894 F.2d 1162, 1164 (10th Cir. 1990). We review the district court's determinations relative to the defendant's role in a criminal activity under the clearly erroneous standard. *United States v. Mays*, No. 89-6123, slip op. at 4 (10th Cir. 1990, May 7, 1990). Thus, we will not reverse the district court's findings unless they are without factual support in the record, or if, after reviewing all the evidence, we are left with the definite and firm conviction that a mistake has been made. *United States v. Beaulieu*, 893 F.2d 1177, 1182 (10th Cir. 1990).

As set forth, *supra*, the district court specifically found that Gonzales, as the driver of a truck bringing in 300 kilos of marijuana, was not a minor participant. The Presentence Report set forth in detail the relevant, uncontested facts surrounding Gonzales' arrest, including, but not limited to: Gonzales' driving a pickup truck from Mexico into the United States with 662 pounds of marijuana; Gonzales' attempt to flee from the Border Patrol; Gonzales' abandonment of the pickup, and his subsequent capture and arrest. Gonzales did not object to or contradict any of the facts set forth in the Presentence Report. Nor did Gonzales establish via credible evidence why he should be considered a minor participant, i.e., "a participant who is less culpable than most other participants". U.S.S.G. § 3B1.2. Rather, Gonzales has simply objected to the district court's interpretation of the relevant, uncontested facts. (*See United States v. Davis*, No. 89-1086, slip op. at 12 (10th Cir. 1990).

Under these circumstances, we hold that Gonzales has failed to establish by a preponderance of the evidence that he was a minor participant. *See: United States v. Gordon*, 895 F.2d 932, 935 (4th Cir. 1990) (drug courier not automatically entitled to a reduction under U.S.S.G. § 3B1.2); *United States v. Williams*, 890 F.2d 102, 104 (8th Cir. 1989) (defendant's status as a courier does not necessarily mean he is less culpable than other participants in a drug operation and entitled to a reduction under U.S.S.G. § 3B1.2); *United States v. Velazquez*, 890 F.2d 717, 720 (5th Cir. 1989) (defendant merely acting as a driver waiting on international border to receive thirty pounds of marijuana not entitled to downward adjustment as a minimal/minor participant); *United States v. Buenrostro*, 868 F.2d 135, 137-18 (5th Cir. 1989) (alleged one-time drug courier not a "minimal participant" under U.S.S.G. § 3B1.2).

Nor do we perceive any merit in Gonzales' contention that the district court did not provide him with an adequate hearing. During the sentencing hearing both Gonzales and his counsel were afforded the opportunity to speak in detail relative to his participation in the criminal activity. Thereafter, and prior to sentencing the district court specifically inquired if there was "[a]nything further before I impose sentence" to which counsel for Gonzales responded, "no." The district

court's finding that Gonzales was not a minor participant in the charged crime was not clearly erroneous.

AFFIRMED.

Entered for the Court:

James E. Barrett,
Senior United States
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 89-2111
OMAR GONZALES, Defendant-Appellant.	)	

ORDER

Filed September 6, 1990

Before SEYMOUR, BARRETT and BRORBY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

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(2)

No. 90-744

In the Supreme Court of the United States

OCTOBER TERM, 1990

OMAR I. GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

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QUESTION PRESENTED

Whether the district court properly found that petitioner was not entitled to a reduction in his offense level as a minor participant under Section 3B1.2(b) of the Sentencing Guidelines.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-9a) was entered on June 21, 1990. A rehearing petition was denied on September 6, 1990 (Pet. App. 10a). The petition for a writ of certiorari was filed on November 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Mexico to one count of possessing more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).* He was sentenced to 87 months' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. On November 11, 1988, a United States Border Patrol agent and a local deputy sheriff were notified that a sensor alert had been activated along the border between the United States and Mexico, about 20 miles south of Hachita, New Mexico. The two officers drove to the sensor alert area, where they saw two vehicles driving away from the area. Pet. App. 2a.

The lead vehicle was a pickup truck without license plates; the one behind it was a pickup truck with Texas license plates, topped with a camper shell. When the officers turned on the lights of their Border Patrol vehicle, the lead truck came to an abrupt stop, causing the truck behind it to stop suddenly as well. The second pickup then pulled around the first truck and proceeded down the highway. The deputy sheriff stayed with the first truck while the Border Patrol agent pursued the second truck. After the agent had pursued the second truck for about four miles, the truck swerved off the highway and traveled across country for another mile before stopping. When the

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* Petitioner was also indicted on one count of importing more than 100 kilograms of marijuana into the United States, in violation of 21 U.S.C. 952(a). That charge was dismissed after petitioner pleaded guilty to the possession count.

agent reached the truck, he found that the driver had abandoned the vehicle. As the agent circled the truck, looking for the driver, a man jumped out of some nearby brush and fled. The agent apprehended the man, who was later identified as petitioner. Pet. App. 2a-3a.

The agent opened the camper of the truck and saw packages of marijuana. He then locked the camper and returned with petitioner to the first vehicle, where he learned that the driver of the first truck had escaped. The officers then returned to the first truck and conducted a field test that confirmed that the substance in the camper was marijuana. The net weight of the 31 packages of marijuana was approximately 662 pounds, or 301 kilograms. Pet. App. 3a.

Petitioner admitted his involvement in the offense. Petitioner claimed that he was hired to drive the truck containing marijuana across the Mexican border. He said, however, that he was not in charge of the smuggling operation and was acting under the supervision of others. He said he was to have been paid about $5,000 for his services in the smuggling operation. Pet. App. 3a.

2. The presentence report calculated petitioner's offense level as 24, and his criminal history category as IV, which established a Sentencing Guideline range of 77 to 96 months. The presentence report noted the provision in the Guidelines under which a defendant may receive a two-point reduction in the offense level if he is a "minor participant" in the criminal activity (Sentencing Guidelines § 3B1.2(b)). The report concluded, however, that "[t]he offense conduct in the instant case provides no indication that [petitioner] meets the criteria for the two level reduction." Pet. App. 4a.

Petitioner's counsel filed objections to that conclusion, arguing that petitioner should be considered a minor participant because he was a mere driver, he was being directed by another man in the lead vehicle, and the supervisor of the entire operation was a third person. Pet. App. 4a. At the sentencing hearing, counsel renewed that argument, to which the district court replied, "Mere driver of a truck bringing in 300 kilos? * * * To me, that's not a minor participant." *Id.* at 5a. After counsel for petitioner completed his argument, the court gave petitioner an opportunity to speak. Petitioner asked the court for leniency and expressed remorse for his conduct. *Ibid.* The court then found that there was no need for an evidentiary hearing because there were no disputed facts. Sentencing Tr. 7. The court imposed a sentence of 87 months' imprisonment, in the middle of the Guidelines range, and four years' supervised release. Pet. App. 5a.

3. On appeal, petitioner argued that the district court erred in finding that he was not a minor participant and in failing to hold an evidentiary hearing on that issue. The court of appeals rejected those arguments. The court of appeals determined that petitioner bore the burden of establishing by a preponderance of evidence that he was a minor participant and that petitioner had not met that burden. Pet. App. 6a-7a. The court accordingly held that the district court did not commit clear error in refusing to find that petitioner was a minor participant. *Ibid.* The court further held that the district court had afforded petitioner ample opportunity to provide information regarding his role in the criminal activity, but that petitioner had failed to take full advantage of that opportunity. *Id.* at 6a-9a.

ARGUMENT

Petitioner renews his contention (Pet. 9-16) that the district court erred in finding that he was not entitled to treatment as a minor participant under the Sentencing Guidelines. The court of appeals correctly rejected that contention.

Petitioner asserts (Pet. 11) that the district court refused to find that he was a minor participant based on the judge's "personal position that there can be no minor role in consideration of say a three hundred (300) kilogram case." Petitioner argues that such an automatic, individualized sentencing rule conflicts with the purpose of the Sentencing Guidelines to foster uniformity.

Contrary to petitioner's contention, the district judge did not fashion a rigid sentencing rule of his own that conflicted with the approach dictated by the Guidelines. While the court responded to petitioner's claim that he was a "mere driver" by remarking that petitioner's conduct did not seem to qualify as minor participation, the court never said that the amount of marijuana petitioner was carrying categorically barred a finding of minor participation. Instead, as the court of appeals determined, the district court's refusal to find that petitioner was a minor participant was based on the absence of evidence to support such a finding:

> The Presentence Report set forth in detail the relevant, uncontested facts surrounding Gonzales' arrest, including, but not limited to: Gonzales' driving a pickup truck from Mexico into the United States with 662 pounds of marijuana; Gonzales' attempt to flee from the Border Patrol; Gonzales' abandonment of the pickup, and his subsequent capture and arrest. Gon-

> zales did not object to or contradict any of the facts set forth in the Presentence Report. Nor did Gonzales establish via credible evidence why he should be considered a minor participant, i.e., "a participant who is less culpable than most other participants." U.S.S.G. § 3B1.2.

Pet. App. 7a. The court of appeals recognized that petitioner's challenge was, at bottom, an "object[ion] to the district court's interpretation of the relevant, uncontested facts." *Ibid.* The court of appeals properly rejected this challenge under the "clearly erroneous" standard of review. 18 U.S.C. 3742(d); *United States* v. *Williams*, 890 F.2d 102, 104 (8th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 136-137 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990).

Far from adopting a categorical rule, the district court made precisely the type of fact-specific finding that is contemplated under the Guidelines. Sentencing Guidelines § 3B1.2, Background ("The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case."). It was surely relevant to this finding that when arrested petitioner was in control of more than 300 kilograms of marijuana; this fact at the very least cast significant doubt on petitioner's characterization of his role as that of a tangential and uninitiated pawn. Indeed, the Commentary to Guidelines § 3B1.2 suggests that in determining whether to apply that Guideline the court may consider the amount of illegal drugs with which a defendant is involved. Guidelines § 3B1.2, Application Note 2 (citing as examples of "minimal participants" for purposes of § 3B1.2(a) "someone who played no other role in a very large drug smuggling operation than to

offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs").

The conclusion by the courts below that petitioner was not a "minor participant" accords with that reached by other courts on similar facts. In *United States* v. *Velasquez*, 890 F.2d 717, 720 (5th Cir. 1989), the court upheld a district court's refusal to apply Guidelines § 3B1.2 in sentencing a defendant who was found "waiting with another person late at night on the international border to receive a thirty-pound load of marijuana." Velasquez, like petitioner in this case, challenged the district court's failure to apply the Guideline on the ground that "he was merely acting as a driver of the vehicle" that was to carry the marijuana. *Ibid.* The court of appeals dismissed that argument, observing that "a court need not accept the defendant's self-serving account of his role in the drug organization." *Ibid.* (internal quotation marks omitted).

In *United States* v. *Williams*, 890 F.2d 102, 104 (8th Cir. 1989), the court of appeals upheld the lower court's refusal to accord "minor participant" status to a one-time courier who claimed to be unaware of the amount of illegal drugs he was carrying. The court of appeals noted that there was evidence that others were paying Williams to carry the drugs but concluded that neither that fact nor any other evidence "established that Williams was any less culpable than those unidentified actors whose actual roles were unknown." *Id.* at 104. The court of appeals also noted that Williams' receipt of $2000 for a single trip cast doubt on his assertion that he was unaware of the amount of drugs he was carry-

ing. *Ibid.* See also *United States* v. *Gordon*, 895 F.2d 932, 934-936 (4th Cir. 1990) (reversing and remanding a finding that defendant was "minor participant" that was based solely on defendant's role as a courier).

In *United States* v. *Buenrostro, supra*, the court of appeals upheld the district court's refusal to classify the defendant as a "minimal participant" under Sentencing Guidelines § 3B1.2(a). 868 F.2d at 137-138. In terms fully applicable here, the court of appeals rejected the notion that one-time couriers should normally be entitled to a reduction under that Guideline:

> [C]ouriers are an indispensable part of drug dealing networks. Without somebody to take the drugs across the border, the drugs will never reach their illicit market. In addition, the mere fact that a defendant was apprehended while acting as a courier does not imply that the defendant is *only* a courier. The district judge need not accept the defendant's self-serving account of his role in the drug organization. Finally, even if the defendant were purely a courier having no knowledge of other aspects of the drug-dealing operation, the defendant might nonetheless be a highly culpable participant * * *. A courier who willingly undertakes illegal transit without asking many questions is especially valuable to a criminal organization.

868 F.2d at 138.

As in the cases discussed above, the challenge in this case is premised on the notion that a self-described one-time courier of illegal drugs is automatically entitled to a reduction in the offense level as a "minor participant" under Guidelines § 3B1.2. The district

court's determination that petitioner was not entitled to such a reduction was a fact-specific finding made after petitioner was afforded ample opportunity to show that he was entitled to a reduction and failed to do so. That finding was not clearly erroneous and therefore was properly upheld by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

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